Supreme Court, U.S.
FILED
OCT 6 1972
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971

NO. 71-1138

In the Matter of: CROSS CONTRACTING COMPANY, INC., a Louisiana corporation, FOR EXONERATION FROM and/or LIMITATION OF LIABILITY AS OWNER OF DRILL BARGE NO. 2

CROSS CONTRACTING COMPANY, *Petitioner*

versus

JOSEPH LAW, JR., WILLIE MANN, JR., et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Of Counsel:

VINSON, ELKINS, SEARLS & SMITH
First City National Bank Bldg.
Houston, Texas 77002

EHRICH AND ZUCKERMAN
Suite 309 Biscayne Bldg.
Miami, Florida 33130

B. JEFF CRANE, JR.
WILLIAM R. ECKHARDT
HARRY ZUCKERMAN
First City National Bank Bldg.
Houston, Texas 77002

Alpha Law Brief Co., One Main Plaza, No. 1 Main St., Houston, Texas 77002

SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Basis for Federal Jurisdiction in the District Court	7
Reason for Granting Writ	7
Conclusion	14
Certificate of Service	15
Appendix A (Opinion of District Court for the Southern District of Florida)	17
Appendix B (Opinion of Fifth Circuit)	21
Appendix C (46 U.S.C., Section 185)	35

LIST OF AUTHORITIES

CASES

	Page
Jackson v. Lykes Bros. S.S. Co., 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488	13
Liverpool B&RPS Navigation Co. v. Brooklyn Eastern District Terminal, (U.S. Supreme Ct. 1919) 251 U.S. 48, 40 S.Ct. 66	3, 8, 9, 10, 12
Sacramento Navigation Co. v. Salz, (U.S. Sup. Ct. 1927) 273 U.S. 326, 47 S.Ct. 868	3, 10, 12
Standard Dredging Co. v. Kristiansen, 67 F.2d	12
The Columbia, (9th Cir., 1896) 73 F. 226	12

UNITED STATES STATUTES

46 U.S.C. §183(a)	2, 3, 8, 14
46 U.S.C. §185	2, 3, 4, 7, 8

IN THE

Supreme Court of the United States

October Term, 1971

NO_____

In the Matter of: CROSS CONTRACTING COMPANY, INC., a Louisiana corporation, FOR EXONERATION FROM and/or LIMITATION OF LIABILITY AS OWNER OF DRILL BARGE NO. 2

CROSS CONTRACTING COMPANY, *Petitioner*
versus
JOSEPH LAW, JR., WILLIE MANN, JR., et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Judges Of The Court:

Petitioner, CROSS CONTRACTING COMPANY, prays that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on January 17, 1972.

Opinions Below

The Opinion of the District Court for the Southern District of Florida, and the Opinion of the Court of Appeals for the Fifth Circuit are printed in Appendix "A" and Appendix "B" hereto. Neither Opinion has yet been reported. The case was No. 71-1037 in the Court of Appeals.

Jurisdiction

The Judgment of the Court of Appeals for the Fifth Circuit was made and entered on January 17, 1972. Petition for Rehearing was denied on February 1, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The reason review is sought is because the decision of the Court of Appeals is in conflict with a prior decision of this Court, or alternatively, has decided an important question of federal law which has not been, but should be settled by this Court.

Questions Presented

1. Whether in this cause wherein the Limitation Fund claimants seek recovery based upon maritime tort causes of action, only the value of the vessel involved in the accident should be included in the Limitation Fund as the amount or value of the interest of such owner in such vessel (under 46 U.S.C. 183(a) and 46 U.S.C. 185), or whether the value of all vessels owned by Petitioner also engaged in performing a non-maritime contract should be included therein.

2. Whether the amount and composition of the Limitation Fund (under 46 U.S.C. 183(a) and 46 U.S.C. 185) in this cause wherein claimants seek recovery based upon

maritime tort causes of action is governed by the tort action test established by this Court's decision in *Liverpool B&RPS Navigation Co. v. Brooklyn Eastern District Terminal,* (U. S. Supreme Ct. 1919) 251 U.S. 48, 40 S.Ct. 66, or by the contract action test established by this Court in *Sacramento Navigation Co. v. Salz,* (U. S. Sup. Ct. 1927) 273 U.S. 326, 47 S.Ct. 868.

3. Whether the existence of the relationship of master and servant between Petitioner and Respondents who are seeking recovery of damages in tort, not in contract, requires including in the Limitation Fund (under 46 U.S.C. 183(a) and 46 U.S.C. 185) the value of all vessels owned by Petitioner used in performing the non-maritime Government Flood Control contract.

Statutes Involved

46 U.S.C. Section 183(a) provides:

> "The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

46 U.S.C., Section 185, under which the Petition for Exoneration From and/or Limitation of Liability was filed appears as Appendix "C".

Statement of the Case

Cross Contracting Company (Cross) filed its Petition herein under 46 U.S.C., Section 185, seeking exoneration from and/or limitation of liability as Owner of Drill Barge No. 2,[1] and also filed its bond in the amount of $25,000, which is the undisputed value of Drill Barge No. 2, and its appurtenances.

Respondents (claimants) moved that the amount of the Limitation Fund be increased to include the value of all vessels and equipment used by Cross in performing its contract to build a flood control levee along the shoreline of Lake Okochobee, Florida, plus the amount of the payments made to Cross under the contract as pending freight.

Upon hearing the motion, the Trial Court entered an order increasing the Limitation Fund to include all waterborne equipment used in performing the contract: namely, Petitioner's Drill Barges No. 1 and No. 2, a pump barge, and a steel barge No. 55 with a dragline aboard.[2] The combined value of the vessels and equipment which the Trial Court held to constitute a flotilla is $247,000. (App. 1-3)[3]

Petitioner, Cross, duly perfected its Interlocutory Appeal from the order of the Trial Court increasing the amount of the Limitation Fund.

---

1. Claimants had theretofore filed separate tort actions against Cross and others seeking recovery of damages for their personal injuries, which actions have been consolidated with the limitation proceeding. (App. 23) Cross pleaded limitation of liability as a defense in each of the other consolidated cases.

2. The value of the skiffs which moved and attended the Drill Barges is either included in the value of the barges, or including their small value in the Limitation Fund is waived. (App. 72)

3. References are to the Appendix filed in the Court of Appeals.

Cross was engaged as a sub-contractor in the construction of Levee 47, Section One, of the Central and Southern Florida Flood Control Project. It was stipulated that all of the work performed by Cross was done in the construction of the flood control levee pursuant to the subcontract. (App. 54-55).

The value of the individual vessels and items of equipment is not in dispute. The dispute is as to which vessels and equipment should have their value included in the Fund. Accordingly, this Statement of Facts will be limited to the relevant facts which relate to this sole issue.

Cross started at the shoreline and worked out into the lake constructing the levee. (App. 107) The work started at the North end of the project and progressed in a southerly direction. A supervising foreman staked out locations (stations) along the shoreline of Lake Okochobee. Drill barges, each with a crew consisting of a Drill Master and three helpers aboard, would drill a series of holes in the lake bottom in which dynamite charges would be placed and exploded to break up the rock on the bottom. Each drill barge would then be moved forward, would continue to drill holes, fill the holes with dynamite, and detonate the dynamite charges from aboard the drill barge. Draglines, usually land-based, but sometimes aboard Barge No. 55, would then move the loosened rock and dirt so as to form the flood control levee which ran generally North to South. The area between the old lake shore and the levee in which the drill barges drilled and blasted was referred to as the "borrow pit". At various points cross-dikes of earth extended from the shoreline to the levee separating individual borrow pits. From these cross-dikes, and from the partly completed levee, land-based

draglines moved material from the borrow pits onto the levee so as to build it to the necessary elevation to contain flood waters of Lake Okochobee.

At the time of the accident on November 11, 1966, Drill Barges No. 1 and No. 2, (*the only drill barges in operation*) were working in the southernmost borrow pit close to the St. Lucie Canal. These two drill barges were each about 60 ft. long and 14 ft. wide. The drill barges had no motive power. They were towed into position by a small skiff with an outboard motor. Each drill barge had its own crew, and separately performed its work of drilling holes, placing and detonating dynamite charges in an area assigned to it for blasting. Drill Barge No. 2 was to the North of Drill Barge No. 1. The two drill barges with their attendant skiffs were the only pieces of waterborne equipment in this southernmost borrow pit and were the only pieces of equipment on the job engaged in drilling and blasting. (App. 97, 100)

There was a gap in the levee which provided egress and ingress from the southernmost borrow pit into Lake Okochobee through which the skiffs could pass to and from the lake proper.

At the time of the accident, a drag line situated on the levee about 1000 ft. to the North of Drill Barge No. 2, was in operation. A pump barge was afloat in another borrow pit. The pump barge was used to control water depths in the borrow pits. However, on November 11, 1966, it could not have been used to do so in the southernmost pit which was at lake level due to the gap. Steel barge No. 55, with a dragline aboard, was located outside the levee in Lake Okochobee at least 8000 ft. North of Drill Barge No. 2 (at station 100) engaged in the

work of placing fill from the lake bottom onto the levee. (App. 29, 115) Neither the pump barge nor Barge No. 55 engaged in any drilling or blasting activity.

The draglines other than the one aboard Barge No. 55 were located on land.

In the late afternoon of November 11, 1966, a premature explosion of dynamite and primacord which had been put in place from Drill Barge No. 2 occurred at or near the Drill Barge causing the injuries sustained by Respondents (claimants).

Neither the pump barge nor the Steel Barge No. 55 with the dragline aboard (total value $197,000) were in any way involved in the accident.

The Court of Appeals affirmed the order of the Trial Court holding that the Limitation Fund should include as the value of "such vessel" the value of all vessels owned by Cross as a flotilla engaged in the performance of the Government Flood Control Project.

Basis for Federal Jurisdiction in the District Court

The Petition for Exoneration From and/or Limitation of Liability filed pursuant to 46 U.S.C. 185 is within the admiralty jurisdiction of the District Court.

Reason for Granting Writ

This Petition raises substantial and important questions concerning what vessel or vessels of the owner must have their value included in the approved security which the owner is required by 46 U.S.C., Section 185, to deposit with the Court for the benefit of claimants as the "value of the interest of such owner in the vessel".

The question is of basic importance in limitation of liability proceedings because in every case where the owner of a vessel involved in an accident owns other vessels which are also engaged in the performance of a contract and which are not involved in the accident, the determination of the amount of security to be deposited will depend upon whether the value of one vessel or of a flotilla of vessels must be included in the limitation fund.[4]

The decision of the court below involves a direct conflict with the decision of this Court in *Liverpool B&RPS Navigation Co. v. Brooklyn Eastern District Terminal,* (U. S. Sup. Ct., 1919) 251 U.S. 48, 40 Sup. Ct. 66, the leading United States Supreme Court case construing the term "such vessel" as used in 46 U.S.C. 183(a) and 46 U.S.C. 185.

In *Liverpool,* a tug pulling a car float caused the car float to collide with another vessel. This Court held that the value of the car float did *not* have to be included in the limitation fund and stated at 251 U.S. page 131:

> ". . . These cases show that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it. If this were a proceeding in rem it may be assumed that the car float and disabled tug would escape, and nonetheless that they were lashed to the Intrepid, and so were more helplessly under its control than in the ordinary case of a tow.
>
> * * *

4. In many cases the amount of the security deposit will determine whether or not to file the Limitation of Liability petition. In the instant case we are informed that Cross would be financially unable to make the additional security deposit required by the order of the Trial Court.

> *No one, we presume, would contend that other unattached vessels, belonging, if you like, to the same owner, and cooperating to the same result with the one in fault, would have to be surrendered. . . .* 'The liability of the owner of any vessel for any injury by collision shall in no case exceed the value of the interest of such owner in such vessel.' *The literal meaning of the sentence is reinforced by the words 'in no case'. For clearly the liability would be made to exceed the interest of the owner 'in such vessel' if you said frankly, 'In some cases we propose to count other vessels in although they are not "such vessel" ';* and it comes to the same thing when you profess a formal compliance with the words, but reach the result artificially construing 'such vessel' to include other vessels if only they are tied to it." (Emphasis added)

The effect of the decision of the Court of Appeals for the Fifth Circuit is to hold that the value of a steel barge No. 55, with the dragline aboard (value $185,000) and a pump barge (value $12,000) must be included in the security deposit as part of the amount for which the owner may be liable merely because they were engaged in performing work for the owner under the same Flood Control contract as the Drill Barge No. 2 where the accident occurred although these vessels were in no way involved in the accident.

Alternatively, if the decision of the Court below is not in direct conflict with the decision of this Court in *Liverpool, supra,* then the petition involves an important question of federal law which has not been, but should be, settled by this Court as to whether in a case involving a tort claim for personal injuries by an employee-claimant, the amount of security to be deposited in the

limitation fund and the liability of the owner of the vessel is governed by the decision of this Court in *Liverpool, supra,* requiring security for only the value of the vessels involved in the collision, or is governed by the contract action test established by this Court in *Sacramento Navigation Co. v. Salz,* (U. S. Sup. Ct. 1927) 273 U.S. 326, 47 S.Ct. 368, 71 L.Ed. 633, and whether if so, the owner should be required to deposit security for and have his liability limited only to the extent of the value of the flotilla vessels engaged in performing the same flood control contract on which the Drill Barge No. 2 was performing drilling and blasting work.

The decision in *Sacramento, supra,* did not involve a master-servant relationship. Sacramento was an action by a cargo owner on the contract for transportation of the cargo to recover the value of a cargo of barley. As stated by this Court at 273 U.S. page 327:

> ". . . the sole question to be determined is whether the barge alone or the combination of tug and barge was the 'vessel transporting' the barley, within the meaning of the Harter Act. . . .
>
> Here, while there was towage service, the contract actually made with respondent was not to tow a vessel but to transport goods, and plainly that contract was *a contract of affreightment.*" (Emphasis added)

The court pointed out that the contract was one of affreightment, the obligation of which was to carry a cargo. *The value of both the barge and tug were included because under the contract both vessels were to be used to transport the cargo.* Distinguishing the prior decision in *Liverpool, supra,* the court said at page 332:

"Liverpool, etc. Nav. Co. v. Brooklyn Term'l, 251 U.S. 48, also relied upon by respondent, is not to the contrary. There the libel was for a collision with petitioner's steamship, the moving cause of which was respondent's steam tug, proceeding up the East River, with a loaded car float lashed to one side and a disabled tug to the other, all belonging to respondent. The car float came into contact with the steamship; but the court said it was a passive instrument in the hands of the tug and did not affect the question of responsibility. *The controversy arose upon a claim to limit liability, petitioner contending that the entire flotilla should have been surrendered. This court held that it was necessary to surrender only the active tug, saying 'that for the purposes of liability the passive instrument of the harm does not become one with the actively responsible vessel by being attached to it.' But this is far from saying that the entire flotilla might not be regarded as one vessel for the purposes of the undertaking in which the common owner was engaged at the time of the collision.* The distinction seems plain. *There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort—no contractual obligations were involved; and the simple inquiry was, What constituted the 'offending vessel'? Here we must ask, What constituted the vessel by which the contract of transportation was to be effected?* a very different question. If the British ship which here was struck by a barge were suing to recover damages and a limitation of liability were sought by the owner of the tug and barge, the Liverpool case would be in point. But *the present libel is for a loss of cargo and falls within the principle of The Columbia, supra, where, upon facts substantially identical with those here, a surrender was required of the combined means by which the company undertook the transportation of the cargo.*" (Empasis added)

The citation with approval in Sacramento, supra of *The Columbia,* (9th Cir., 1896) 73 F. 226, was not a holding that the contractual rule announced in *Sacramento* is applicable to a tort claim when there is a master-servant relationship.[5] Careful reading of the *Sacramento* decision reveals that *The Columbia* was referred to as another case involving a contract of affreightment where a barge with no motive power and a tug belonging to the same owner were used to transport a cargo (wheat). No mention was made by the Supreme Court of the tort claimants involved in *The Columbia* litigation. In *The Columbia,* there were claims both by the owner of the cargo of wheat and by representatives of crew members who were killed in the same accident which also resulted in the loss of the cargo. Because there was a claim filed by the owner of the cargo, the limitation fund necessarily had to be comprised of all vessels by which the contract of transportation was to be effected. That there were also personal injury claimants was immaterial to the composition of the limitation fund.

The decision in *Sacramento* applies on its facts only to suits on contracts for transportation of cargo. The decision left undisturbed the holding in *Liverpool* that where the cause of action arises out of a maritime tort, only the value of the offending vessel is to be included in the limitation fund as the "value of the interest of such owner in such vessel".

In deciding whether *Liverpool, supra,* or *Sacramento, supra,* governs, we submit that it is of basic importance

5. An erroneous belief that the *Sacramento* citation of *The Columbia* had this effect seems to be the basis for the statement made by the Second Circuit, which is dictum that the contractual rule of *Sacramento* applies where a master-servant relationship exists. See: *Standard Dredging Co. v. Kristiansen,* 67 F.2d at 548.

that the Government Flood Control contract under which Cross was performing work as a sub-contractor is not the basis either of the Court's jurisdiction, or of the claimants' causes of action. The claims are not based upon the Government Flood Control contract. They are maritime tort claims. Two claimants alleged Jones Act status as crew members of the drill barge No. 2 under 46 U.S.C. 688. Three claimants have brought direct actions against their employer in admiralty as harbor-workers as authorized by *Jackson v. Lykes Bros. S.S. Co.,* 386 U.S. 731, 87 S.Ct. 1419, 18 L.Ed.2d 488. Consequently, because the claims are not based upon the contract which Cross was performing, the inquiry is: *"What constituted the offending vessel?"* (*Liverpool's* test) *not "What constituted the vessel by which the contract was to be effected?"* (*Sacramento's* test).

The operative facts determinative of the issues here involved are undisputed. Respondents have never contended that steel barge No. 55 with the dragline aboard, or the pump barge were in any way involved in the premature explosion of dynamite charges placed from the Drill Barge No. 2 which caused the claimants' injuries. The value of each vessel was stipulated.

Additionally, there is no issue of fact as to what each vessel was doing in relation to the other. The Drill Barge No. 2 where the explosion occurred, and a Drill Barge No. 1 drilled holes, placed charges of dynamite, and blasted to break up rock on the bottom. *As an independent later stage of the construction, draglines including the one located on the steel barge piled broken rock to make the levee. The pump barge merely pumped water. Its work was unrelated to the drilling and blasting done by the Drill Barge No. 2.*

In determining the amount of security comprising the Limitation Fund, the trial court and the Court of Appeals for the Fifth Circuit should have approached the issue from the standpoint of the accident, and determined what vessel, or vessels were involved in the accident. This is what is required to be done by the plain language of the statute, 46 U.S.C. 183(a) which limits the liability of the owner to the value of the vessel which caused the loss, damage or injury. The courts below erred by approaching the question from the standpoint of the contract which the drill barge and other vessels were performing. This approach resulted in an erroneous construction of the term "such vessel" as used in the statutes aforementioned.

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

B. JEFF CRANE, JR.
WILLIAM R. ECKHARDT
HARRY ZUCKERMAN

By: _____

Of Counsel:

VINSON, ELKINS, SEARLS & SMITH
First City National Bank Bldg.
Houston, Texas 77002

EHRICH AND ZUCKERMAN
Suite 309 Biscayne Building
Miami, Florida 33130

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Brief was mailed this _____ day of March, 1972 to the following attorneys of record:

Mr. Edward L. Magill
Stephens, Demos, Magill & Thornton
720 Biscayne Building
Miami, Florida 33130

Mr. Talbot D'Alemberte
McCarthy, Steel, Hector & Davis
1414 First National Bank Building
Miami, Florida 33131

Mr. Arthur Roth
1111 Ainsley Building
Miami, Florida 33132

Mr. Robert W. Rust
United States Attorney
Post Office Box 1070
Miami, Florida 33101
Attention: Mr. Alfred E. Sapp

Mr. Thomas L. Jones
United States Attorney
Admiralty & Shipping Section
Department of Justice
Washington, D. C. 20530

Mr. Donald Feldman
Feldman and Abramson
1413 Ainsley Building
Miami, Florida 33132

Mr. Richard F. Ralph
Ralph & Boyd
Northeast Airlines Building
Miami, Florida 33131

APPENDIX A

United States District Court

SOUTHERN DISTRICT OF FLORIDA

CASE NUMBER 68-280-Civ-JE

IN THE MATTER OF:

CROSS CONTRACTING COMPANY, INC., a Louisiana corporation, FOR EXONERATION FROM, AND/OR LIMITATION OF LIABILITY AS OWNER OF DRILL BARGE NO. 2.

(Filed September 23, 1970)

ORDER UNDER RULE F (7) INCREASING THE LIMITATION FUND

THIS CAUSE came before the Court on a hearing pursuant to Supplemental Admiralty Rule F (7), and the motion of some claimants to examine the adequacy of the limitation fund.

The Court heard the testimony and examined the evidence. After hearing argument of counsel, and being otherwise advised in the premises, the Court is now pre-

pared to enter its findings of fact and conclusions of law as they relate to the Rule F (7) Procedure.

The Court finds that the work on this project was actually conducted by Cross Contracting Company, Inc. ("Cross") under sub-contract with E. & I., Inc., which in turn was under sub-contract to the prime contractor, Ron Lee, Inc. Ron Lee, Inc., had its contract from the United States Army Corps of Engineers to construct a dike or levee for the purpose of flood control. This project was to be done on Lake Okeechobee, which is part of the navigable waters of the United States and is within the admiralty and maritime jurisdiction of the United States and of this Court.

The claimants, employees of the petitioner filed various actions against the petitioner claiming personal injury caused by negligence and unseaworthiness.

The petitioner thereupon petitioned this Court for exoneration from and/or limitation of liability as owners of Drill Barge No. 2 and posted into the Registry of the Court its ad interim stipulation for value in the amount of $25,000.00. The claimants filed their claims and answers and contested the amount of the fund. The claimants moved for hearing thereon pursuant to Rule F (7), Supplemental Admiralty Rules, Federal Rules of Civil Procedure.

The Court has jurisdiction of the parties and of the subject matter hereto.

The evidence shows and the Court finds that the contract was being performed by Cross Contracting Company with a flotilla of vessels working with each other to complete the Cross portion of the contract. Cross had

other equipment working on the job for the performance of the contract, but those pieces of equipment which were not afloat were not part of the flotilla. Only those pieces of equipment which were afloat on the navigable waters constituted a flotilla for the purpose of this hearing. The petitioner has filed an ad interim stipulation for value on Barge No. 2. Working at the same time on the project was petitioner's Drill Barge No. 1 which had a value as of November 11, 1966, of $25,000.00. The petitioner also had a pump barge working on the project which was then valued at $12,000.00.

Petitioner's Manitowoc Model 4500 dragline, serial #4638 with a value of $35,000.00 was working on the levee, afloat on a Bethlehem Steel Barge which petitioner's foreman described as Walsh Construction Company #55, which had a value of $150,000.00.

The combined value of the flotilla is $247,000.00.

The claimants also moved the Court to require the petitioner to post into the Registry of this Court its freight pending at the time of the accident. The Court finds that the claimants worked aboard the barge, but reported for work daily and returned home every evening. The petitioner was paid monthly for the number of yards of fill computed to have been moved during the month. If such circumstances constitute a "voyage" so as to give rise to a determination of "pending freight"—and I think they do not—an attempt to determining the value of "pending freight" would necessarily be conjectural. Therefore, the motion as it relates to pending freight is denied.

The petitioner had additional equipment on the job including two drag lines, some land vehicles and office equipment. Those pieces of equipment are not part of the

flotilla, as they had never been afloat on this job and were not working afloat on the navigable waters of the United States.

It is thereupon

ORDERED and ADJUDGED that the claimants' motion under Supplemental Admiralty Rule F (7), Federal Rules of Civil Procedure, be and the same is hereby granted, and the petitioner, Cross Contracting Company, Inc., shall increase its ad interim stipulation for value from the amount of $25,000.00 to the amount of $247,000.00; or in the alternative, it may surrender to the United States Marshal its Drill Barge No. 1 of the value of $25,000.00; its pump barge of the value of $12,000.00; its Manitowoc Model 4500 dragline, serial #4638, of the value of $35,000.00 and its Bethlehem Steel Barge, Walsh Construction Company #55, of the value of $150,000.00; or the value of each piece of equipment which is not surrendered.

So much of the motion requesting that the petitioner be required to post pending freight into the Registry of the Court be and the same is hereby denied.

Petitioner shall comply herewith within 15 days from the date hereof.

DONE and ORDERED at Miami, Southern District of Florida this 22nd days of September, 1970.

JOE EATON
United States District Judge

cc: counsel of record.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1037

In the Matter of: CROSS CONTRACTING COMPANY, INC., a Louisiana corporation, FOR EXONERATION FROM and/or LIMITATION OR LIABILITY AS OWNER OF DRILL BARGE NO. 2

CROSS CONTRACTING COMPANY, INC.,
Appellant-Cross Appellee,

versus

JOSEPH LAW, JR., WILLIE MANN, JR., ET AL.,
Appellees-Cross Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

(January 17, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

AINSWORTH, Circuit Judge: Cross Contracting Company, Inc. filed this petition in Admiralty under Rule

9(h), Fed. R. Civ. P., for exoneration from and/or limitation of liability (in accordance with 46 U.S.C. §§ 181-195 and Supplemental Admiralty Rule F. Fed. R. Civ. P), as owner of Drill Barge No. 2.[1] An ad interim stipulation in the sum of $25,000, the value of the barge, was posted with the Court. Cross, a subcontractor, was engaged in construction of a levee for the purpose of flood control in Lake Okochobee, Florida, a navigable waterbody in Florida, pursuant to a prime contract entered into with the U. S. Army Corps of Engineers. Cross used a number of pieces of equipment in the work, some of which consisted of vessels and equipment on vessels as well as equipment on land. Cross's drilling barges were used to dig a canal, the dirt from which was used to build the levee. The drilling barges would blast rock and soil at the bottom of the lake and this operation would be followed by draglines which would pull the material up from the water to form the levee. A dynamite explosion occurred on Drill Barge No. 2 which caused serious personal injuries to five claimants, all of whom were employees of Cross. They filed a number of damage suits against petitioner Cross for personal injuries which they alleged were caused by negligence and unseaworthiness.

---

1. Especially pertinent to our discussion herein are the provisions of 46 U.S.C. § 183(a) which read as follows:

> "The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

This interlocutory appeal (28 U.S.C. § 1292(a) (3)) grows out of the motion of claimants (under Supplemental Admiralty Rule F(7), Fed. R. Civ. P.) to require that petitioner increase the amount of security to an amount equal to the value of all of Cross's equipment, including "freight then pending" (see 46 U.S.C. § 183(a)), that is, the amount due Cross under the contract for work performed up to the time of the accident.

The District Judge conducted a hearing, took evidence, made findings, and entered an order under Supplemental Admiralty Rule F(7), Fed. R. Civ. P., requiring an increase in the security. He found that Cross was performing its contract "with a flotilla of vessels working with each other to complete the Cross portion of the contract." He also found that Cross had other equipment working on the job which was not afloat or part of the flotilla and that only those pieces of equipment which were afloat should be considered a part of the flotilla. He excluded from the flotilla and the amount of the bond those pieces of equipment, draglines, land vehicles and office equipment which were not working afloat on navigable waters at the time of the accident. The District Judge, accordingly, ordered an increase of the ad interim stipulation from the original sum of $25,000 covering Barge No. 2 to the value of the entire flotilla and its equipment totaling $247,000. He declined to add, however, the amount of pending freight, concluding that an attempt to determine the value thereof "would necessarily be conjectural."

This case requires an interpretation of the so-called "flotilla doctrine" in that we must determine what shall constitute the limitation fund, and whether it shall consist only of the value of Drill Barge No. 2, as the offending

vessel. In doing so, we must decide also whether any additional amount shall include the value of all of petitioner's vessels and equipment engaged in the project or of only that which was afloat at the time of the accident.

Petitioner relies most strongly on *Liverpool, B. & R.P.S. Navigation Co. v. Brooklyn Eastern District Terminal*, 251 U.S. 48, 40 S.Ct. 66 (1919), where a tug which was proceeding with a car float loaded with railroad cars lashed to its port side, and on its starboard side a disabled tug, all belonging to respondent, caused the car float to collide with another vessel. The Court held that "the actively responsible vessel," that is, the tug and its value alone, should be included in the limitation fund but that the value of the car float and disabled tug need not be included since the tug alone was the offending vessel, under the circumstances described.

Later, however, in another Supreme Court decision, *Sacramento Nav. Co. v. Salz*, 273 U.S. 326, 47 S.Ct. 368 (1927), petitioner in limitation, a common carrier, was required to surrender—as the "offending vessel"—both a steamboat and the barge it was towing, where the barge came into collision with a British ship and was swamped, losing its cargo of a load of barley. Respondent's claim was based on a contract of affreightment with petitioner. The Court denied petitioner's contention that the barge alone should be surrendered. The Court distinguished its holding in *Liverpool* as follows:

> "The distinction seems plain. There the libel was for an injury to a ship in no way related to the flotilla. It was a pure tort; no contractual obligations were involved; and the simple inquiry was, What constituted the 'offending vessel'? Here we must ask, What

constituted the vessel by which the contract of tranportation was to be effected? a very different question." 273 U.S. at 332, 47 S.Ct. at 370.

Two Second Circuit cases are pertinent to the factual situation here. In *Standard Dredging Co. v. Kristiansen,* 1933, 67 F.2d 548, that Court held in a case involving a seaman's claim for injury sustained while working on an unseaworthy barge, that petitioner in limitation must surrender not only the barge but also a dredge and two tugboats, all of which shared in the execution of the venture and were held collectively to be the "vessel" within the meaning of the limitation statute. In that case the Court (L. Hand, J.) said:

> "* * * whatever may be thought of the law before 1927, Sacramento Nav. Co. v. Salz, 273 U.S. 326, 47 S.Ct. 368, 370, 71 L.Ed. 663, settled it. True, that case arose under section 3 of the Harter Act (46 USCA § 192), but the court expressly declared that the question was the same in cases of limitation. A tug and her barge in tow were treated as a single vessel, because owned in common and engaged in a common enterprise, and the doctrine of The Columbia, supra (C. C. A.) 73 F. 226, was used as the keystone of the reasoning. The court thought Liverpool, etc., Nav. Co. v. Brooklyn Eastern Terminal, supra, 251 U.S. 48, 40 S.Ct. 66, 64 L.Ed. 130, plainly distinguishable; it was concerned with 'a pure tort; no contractual obligations were involved.' When they are, it is possible to regard an 'entire flotilla * * * as one vessel for the purposes of the undertaking in which the common owner was engaged.' In that case the relevant inquiry is, 'what constituted the vessel by which the contract of transportation was to be effected.' In view of this language and of the use made of The Columbia, supra (C. C. A.) 73 F. 226, when the duty involves 'contractual obliga-

tions,' the whole flotilla embarked in the enterprise is the 'vessel'; a conclusion which would comprise not only the barge here, but the two attending tugs as well." 67 F.2d at 550.

Finally, the Court said:

"We do not so understand Sacramento Nav. Co. v. Salz, supra, 273 U.S. 326, 47 S.Ct. 368, 71 L.Ed. 663; rather we read it as meaning that when the duty violated, though imposed by law, presupposes at least the relation of master and servant, the owner must surrender all those vessels which share in the execution of the venture; collectively they are 'such vessel' within R.S. §4283 (46 USCA § 183)." 67 F.2d at 551.

In *United States Dredging Corp. v. Krohmer*, 1959, 264 F.2d 339, another limitation of liability case, the Second Circuit held that the widow of a deceased crewman who was killed in a fire on one of petitioner's vessels was entitled to have petitioner surrender five other vessels engaged in the same venture at the same time where all of the attending vessels were necessary for performance of their owner's contract. The Court said:

"In Sacramento Navigation Co. v. Salz, 273 U.S. 326, 47 S.Ct. 368, 71 L.Ed. 663, although the case arose under the Harter Act, the Court resolved it by application of the same rules that limit a shipowner's liability; and following the doctrine of The Columbia, 9 Cir., 73 F. 226, held that, when a barge and tug were transporting a cargo of barley, both were to be deemed a single 'vessel,' and the tug must be surrendered as well as the barge. In Standard Dredging Co. v. Kristiansen, 2 Cir., 67 F.2d 548, a seaman employed on a dredge was injured while working on an unseaworthy barge, which was used as a tender to supply oil to the dredge, and which at the time

was not made fast to her. We held that the dredge must be surrendered as well as the barge, because each was part of the means that the shipowner was using to perform its contract. The owner had assumed 'contractual obligations' with the claimant, and that involved any ships that it devoted to the performance of its contract with a third person. As a new question it is hard to see why the shipowner's liability should be broader when it presupposes a consensual relation with the claimant than when it rests upon the invasion of the interest of a person with whom the owner has had no preceding relation. However, it is at least doubtful whether the motives that originally lay behind the limitation are not now obsolete; and certainly we should now have no warrant for extending its scope, when the liability is for personal injury arising from the shipowner's fault." 264 F.2d at 341.

In this Circuit, in *Brown & Root Marine Operators, Inc. v. Zapata Off-shore Co.*, 1967, 377 F.2d 724, we affirmed a District Court ruling which required that petitioner in limitation furnish the value of three vessels which "were contractually engaged in a common enterprise," namely, a barge, a derrick barge, and a tug. The barge which had been improperly anchored at the time of the occurrence of a hurricane collided with Zapata's oil well resulting in substantial damage. Petitioner had entered into a contract with Zapata for the furnishing of certain labor and materials in pursuance to which it had furnished the three vessels referred to. Petitioner sought to limit its liability to the value of that barge but we held that it must surrender the other two vessels which were engaged in the common venture under a single command. We held that "The fact that the vessels are not physically bound together is irrelevant; the test is '* * * devotion to a single venture * * *.'" Id. at 727.

As we have pointed out, the District Judge held that Cross was performing its contract with a flotilla of vessels working with each other. It is also clear that claimants here were employees of petitioner and that the contractual relationship of master and servant existed between them. The circumstances, therefore, compel affirmance of the District Judge ruling that the value of Cross's entire flotilla must be surrendered in this case under the petition for limitation.

We agree with the holding of the District Judge relative to "freight then pending" and the rejection of respondents' contention in that regard. The evidence shows that Cross is a subcontractor performing construction work in the building of a levee. There is little relationship between pending freight as used in the commonly accepted maritime cases, and money due for construction of a levee, as described here. There was, therefore, no "voyage" as such. Likewise, there is no practical way to compute freight, there being no evidence in the record by which such a computation could be made. See LaBourgogne, 210 U.S. 95, 134, 135, 141, 28 S.Ct. 664, 678, 679, 681 (1908); The Black Eagle, 2 Cir., 1937, 87 F.2d 891, 893, 894; In re Pacific Inland Nav. Co., D. C. Hawaii 1967, 263 F. Supp. 915.

AFFIRMED.

GODBOLD, Circuit Judge, specially concurring in part and dissenting in part:

As to the cross-appeal only, I would reverse. The District Court found there was no pending freight because there was no voyage, and the majority opinion appears to do the same. The term "voyage" is not a qualitative

term describing the type of enedeavor in which a vessel is engaged and restricting limitation of liability proceedings to those vessels which move across the water from one point to another. It is a sequential term, separating one adventure or undertaking or trip from another, employed as a means of dividing the activities of the vessel from what has occurred before the undertaking in question, and what, if anything, has occurred subsequent to it, so that there can be identification both of what should go into the limitations fund and of what persons were exposed to the perils of the venture so as to be entitled to participate in the fund. *Deslions v. La Compagnie Generale Transatlantique*, 210 U.S. 95, 135, 52 L.Ed. 973, 992 (1907).

"Freight pending" means the earnings of the vessel in the undertaking, and it is not limited to payment for the transportation of goods, but "[i]t is applied to all rewards, hire, or compensation, paid for the use of ships; either for an entire voyage, one divided into sections, or engaged by the month, or any period." *The Main v. Williams*, 152 U.S. 122, 129-130, 88 L.Ed. 381,.384 (1893).[1]

In this case, as part of its total undertaking, Cross used movable but propulsionless "drilling barges" to blast rock and soil from the bottom of a lake, and then employed draglines, some floating on propulsionless barges and some land based, to move the loosened material from the lake bottom and form it into a levee. Payments to Cross for that part of the undertaking which was carried on by and

1. This case traces in some detail the historical meaning of "freight" as the price paid for the use of a ship, and points out the object of limitation of liability as one of limiting liability to the interest of the owners in the "adventure." 152 U.S. at 129-131, 38 L.Ed. at 384.

from vessels were parts of the overall payments made to Cross for the levee construction project. Though mingled with other items of compensation, the earnings of the vessels in this case are no less freight pending than the payment to the Captain Jack, a propulsionless derrick lighter, for raising a sunken vessel from a harbor, *The Captain Jack*, 162 F. 808 (D. Ct. Conn. 1908), or the earnings of a dredge floating on a bay and engaged in deepening a channel by removing material from the bottom of the bay, *The Carson*, 104 F.2d 762 (9th Cir. 1939).

The evidence in the present case showed the gross earnings received by Cross on the overall undertaking. The earnings of the vessels are no less freight pending by reason of the fact that Cross made no attempt to ascertain and make known to the court what part of the gross payments represented earnings of the vessels. Instead Cross took the position there was no freight pending. The burden was not upon claimants but upon Cross to establish the portion of the gross properly allocable to earnings of the vessels. "The privilege of limiting liability is granted the owner of an offending vessel on condition that he surrender the value of his interest in 'such vessel, and her freight the pending.'" *In re W. E. Hedger Co.*, 59 F.2d 982 (2d Cir. 1932). "The petitioner in a limitation proceeding has the burden of proving compliance with the conditions which entitle him to limit liability. The Rambler, 290 F. 791, 792 (C.C.A.2). He must show the value of his interest in the vessel and her pending freight." *Id.* at 983. Until Cross determined, and surrendered, the amount of its earning from the vessels, it had not complied with the conditions precedent to limitation of

liability. The majority confer a benefit on Cross from its failure to discharge the condition.

In *Rice Growers Ass'n v. Rederiaktiebolaget Frode,* the gross amount of a bill of lading was denoted by the bill itself as freight, and the shipowner argued that there should be excluded from the gross amount items of services to cargo on the ground they were not services rendered by the vessel. The lower court refused to deduct them because the petitioner had failed to prove that the services were not rendered by the ship, and the appellate court affirmed. In *In re W. E. Hedger Co., supra,* the District Court found that the freight pending of a tug was the gross amount collected as freight from the barges in its tow (it being admitted that the flotilla rule did not apply). The tug owner attempted unsuccessfully to prove that others were entitled to 45% of the gross and it to only 55%, but its proof failed. The Court of Appeals affirmed. Its rationale is already quoted above.

It is simply wrong, when a petitioner asserts there is no freight pending, but in fact there is, to deny the claimants any protection of freight pending because they have not established what part of petitioner's gross is allocable thereto. This misconceives the purpose, the operation and the burdens of a limitation proceeding. And, pragmatically, it imposes an awkward, if not unworkable, approach. The petitioner, with the books, records and knowledge, is far more able to allocate its gross than are injured claimants.

176 F.2d 401 (9th Cir.) cert. denied 338 U.S. 878 94 F.Ed. 539 (1949).

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-1037

In the Matter of: CROSS CONTRACTING COMPANY, INC., a Louisiana corporation, FOR EXONERATION FROM and/or LIMITATION OR LIABILITY AS OWNER OF DRILL BARGE NO. 2

CROSS CONTRACTING COMPANY, INC.,
Appellant-Cross Appellee,

versus

JOSEPH LAW, JR., WILLIE MANN, JR., ET AL.,
Appellees-Cross Appellants.

Appeal from the United States District Court for the Southern District of Florida

---

Before BELL, AINSWORTH and GODBOLD,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that appellant-cross appellee pay to appellees-cross appellants, the costs on appeal to be taxed by the Clerk of this Court.

January 17, 1972

GODBOLD, Circuit Judge, specially concurring in part and dissenting in part:

Issued As Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-1037

In the Matter of: CROSS CONTRACTING COMPANY, INC., a Louisiana corporation, FOR EXONERATION FROM and/or LIMITATION OR LIABILITY AS OWNER OF DRILL BARGE NO. 2

CROSS CONTRACTING COMPANY, INC.,
Appellant-Cross Appellee,
versus
JOSEPH LAW, JR., WILLIE MANN, JR., ET AL.,
Appellees-Cross Appellants.

Appeals from the United States District Court for the Southern District of Florida

---

(February 1, 1972)

ON PETITION FOR REHEARING

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Cross Contracting Co., Inc. in the above entitled and numbered cause be and the same is hereby DENIED.

APPENDIX C

§ 185 PETITION FOR LIMITATION OF LIABILITY; DEPOSIT OF VALUE OF INTEREST IN COURT; TRANSFER OF INTEREST TO TRUSTEE

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.